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Supreme Court of the United States

OCTOBER TERM, 1933.

No. 802.

JOHN C. LEWIS, as Receiver of the Hancock National Bank of Sparta, Georgia, *Petitioner,*

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Respondent.*

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit and Brief in Support Thereof.

SAMUEL H. WILEY,
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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit and Brief in Support Thereof.

To the Honorable the Supreme Court of the United States:

Your Petitioner, John C. Lewis, as Receiver of the Hancock National Bank and successor in said trust to W. K. Howard, deceased, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit rendered in the case of Fidelity & Deposit Company of Maryland, appellant, vs. W. K. Howard, as Receiver of Hancock National Bank of Sparta, Georgia, appellee, on December 7, 1933, 67 Fed. (2d) 961) reversing the judgment of the United States District Court for the Middle District of Georgia.

I.

THE CASE.

The Fidelity & Deposit Company of Maryland, as subrogee and assignee of the rights of the State of Georgia, under a State depository bond executed July 12, 1928, by the Hancock National Bank of Sparta, Georgia, as principal, and the Fidelity & Deposit Company of Maryland, as surety, to the Governor of Georgia, filed suit in the Superior Court of Hancock County, Georgia, against W. K. Howard, in his capacity as Receiver of said national bank, seeking to establish a lien, ranking in priority from the date of execution of said bond, on all the property of said bank and the proceeds of all assets coming into the control of said Receiver, to the amount of the State's deposit in the bank at the time of the Receiver's appointment. This suit was removed to the United States Court.

Plaintiff in said suit based its claim of lien on Sects. 1252 and 218 of the Code of Georgia, the material parts of which are as follows:

> "Each of said depositories shall, before entering upon the discharge of their duties, by their proper officers, execute a bond, with good and sufficient securities, to be fixed and approved by the Governor. Said bond shall be conditioned for the faithful performance of all such duties as shall be required of them by the General Assembly or the laws of this State, and for a faithful account of the money or effects that may come into their hands during their continuance in office. * * * and said bonds shall have the same binding force and effect as the bond required by law to be given by State treasurers, and in case of default, shall be enforced in like manner. * * *
>
> Sect. 1252, Park's Ann. Code of Ga.
>
> * * * all the property of the treasurer to the full amount of said bond, and the property of the securities to the amount for which they may be severally bound, shall be liable for the faithful performance by the trea-

surer of the duties of his office, from the date of the execution of said bond; and a lien is hereby created in favor of the State upon the property of the treasurer to the amount of said bond, and upon the property of the securities upon his said bond to the amount for which they may be severally liable, from the date of the execution thereof."

Sect. 218, Park's Ann. Code of Ga.

The Receiver filed his motion to dismiss plaintiff's petition, asserting: (1) The lien sought to be established is invalid; (2) there is no equity in the petition; (3) the execution of the bond was beyond the charter power of a national bank, without authority of law and contrary to public policy; (4) the execution of said bond did not create a valid lien in favor of the State on the assets of said bank.

The trial court sustained the motion and entered a judgment dismissing the petition in so far as it sought to establish a lien upon the properties of the bank in the hands of said Receiver, but retained the petition for the sole purpose of allowing plaintiff to establish its claim as a general creditor.

A stipulation by the Receiver in open court admitted all allegations of the petition except the claim of lien; whereupon, the District Court entered its final decree denying the lien contended for and allowing plaintiff's claim in the amount of $6,206 as a general creditor.

From this final decree plaintiff appealed to the United States Circuit Court of Appeals for the Fifth Circuit. The Circuit Court of Appeals reversed the judgment of the District Court on December 7, 1933.

While said case was pending in the Circuit Court of Appeals on a stay of mandate, W. K. Howard died, and your petitioner was substituted for the said Howard as a party in said case in the Circuit Court of Appeals.

II.

QUESTIONS PRESENTED.

(1) Whether the statutes of Georgia, codified as Sects. 1252 and 218 of the Code of Georgia, declaring a lien on all the property of a bank appointed a State depository, upon its giving a depository bond, to the amount of the bond and from the date of the bond, is valid and enforceable as to national banks qualifying as State depositories.

(2) Whether a national bank has the power to give a lien on all of its property of every kind and character, including property subsequently acquired, to secure deposit of State funds, by giving a depository bond to which State statutes attach such a lien.

(3) Whether a national bank has the power to give a bond to a state conditioned for the faithful performance of all such duties as shall be imposed on it by the General Assembly and the laws of the state.

(4) Whether the statutes of Georgia declaring a lien on all the properties of a depository bank are properly construed as providing a lien from the execution of the depository bond, effective as to land, which does not, however, attach to assets such as notes, accounts, stocks and other commercial assets, until a receiver is appointed for such bank on its insolvency.

(5) If the lien to be given the State under these statutes, on all the property of a depository bank, is only effective as to commercial assets on the appointment of a receiver, are not these statutes in conflict with the provisions of the National Banking Act as set forth in Sects. 194 and 91, Title 12, U. S. C. A., when applied to a national bank for which a receiver has been appointed?

(6) If the statutes of Georgia declaring a lien on all the properties of a depository bank are properly construed as creating a lien, effective from the date of the bond, on all the property of the bank of every kind and character, would not such a lien impair the functions of a national bank as

an agency and instrumentality of the National Government, and render invalid the Georgia statutes when applied to a national bank?

(7) Sect. 1256 of the Georgia Code requires a national bank in qualifying as a State depository to give a depository bond, to give a bond in double the amount of the deposit. Sect. 1252, which provides for the lien from the date of execution of the depository bond, requires a bond only equal to the amount of the deposit.

Does not the requirement of Sect. 1256, calling for bond twice the amount of the deposit, render inapplicable to national banks the lien provision of Sect. 1252, requiring bond only equal to the deposit?

III.

ASSIGNMENTS OF ERROR.

(1) The Circuit Court of Appeals erred in deciding in substance and effect that the statutes of Georgia declaring a lien on all the property of a depository bank from the date of the depository bond are valid as applied to a national bank qualifying as a State depository.

(2) The Circuit Court of Appeals erred in deciding that a national bank has power to give a general lien on all of the property of the bank to secure a deposit of State funds.

(3) The Circuit Court of Appeals erred in deciding that the lien prescribed by the statutes of Georgia in the case of a depository bank is enforceable against the bank's property of all kinds in the Receiver's hands.

(4) The Circuit Court of Appeals erred in construing Sects. 1252 and 218 of the Georgia Code as authorizing a national bank as a State depository to give a general lien on all the property of the bank to secure deposits of State funds.

(5) The Circuit Court of Appeals erred in construing Sects. 1252 and 218 so as to create a lien on all assets of a national bank in Georgia—a lien existing from the time

of the execution of the depository bond, but sleeping and innocuous until insolvency, when it becomes awakened and effective, attaching to all assets of every character in the hands of the receiver.

IV.

REASONS FOR GRANTING CERTIORARI.

(1) The questions presented in this petition are of great general importance because vitally affecting the business of national banks and the distribution of the funds of insolvent national banks.

Under the decision of the Circuit Court of Appeals a state can, by statute, declare a lien on all property of a National bank receiving state funds on deposit, which will be inoperative as to commercial assets while the bank is a going concern, but which will become effective only on the appointment of a receiver, and thereby give to the state a preference, providing the statute is so drafted as to declare a lien from the date of the execution of the depository bond. Such a lien, the Circuit Court of Appeals says, will not impair the functions of a national bank as an instrumentality of the Government because declared to be analogous to the Georgia statutory chattel mortgage on a stock of merchandise, changing in specifics, so long as the bank is a going concern, and that such a lien will not conflict with the provisions of the National Banking Act prohibiting preferences, because the statute provides that the lien comes into life on the execution of the depository bond.

(2) The Circuit Court of Appeals in this case has decided an important question of Federal law which has not been, but should be, settled by this Court, to-wit: The power of a national bank to give a lien on all of its property of every kind and character, and the validity of such a lien declared by a state statute as applied to a national bank.

This question should be settled by this Court because it vitally affects the powers of a national bank, and the pow-

ers and duties of the Comptroller of the Currency in the supervision of national banks and the administration of its assets on insolvency, and also vitally affects the rights of all persons dealing with a national bank which may be a state depository.

(3) The decision handcuffs the Comptroller of the Currency in the ratable and equitable distribution, among its creditors, of the assets of an insolvent national bank in Georgia, and in all other states having or hereafter enacting similar statutes, and will involve the receivers of insolvent national banks in numerous suits to determine the effect of such statutes and how they shall make distribution of the assets of insolvent national banks, as directed by the National Banking Act and as limited by state statutes.

(4) The Circuit Court of Appeals has decided a Federal question in conflict with the decision of this Court in the case of Davis vs. Elmira Bank, 161 U. S. 275, in that the Circuit Court of Appeals decided that a lien arises upon all the property of a national bank upon its giving a Georgia depository bond, which is ineffective as to commercial assets until the appointment of a receiver, but is valid and enforceable against all assets in the hands of such receiver. In the case of Davis vs. Elmira Bank, 161 U. S. 275, this Court denied the validity of a state statute creating a lien arising on insolvency of a national bank. The Georgia statute, as construed by the Circuit Court of Appeals, and in its operation and effect, is in conflict with the provisions of the National Banking Act set forth in 12 U. S. C. A., Sects. 194 and 91.

(5) The decision of the Circuit Court of Appeals conflicts with the decision of this court in the case of Cook County National Bank vs. U. S., 107 U. S. 445, wherein this Court considered the National Banking Act as constituting a complete system for the establishment and government of national banks and providing everything essential to the winding up and distribution of their effects, neither limited

nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents. Likewise, said decision is in conflict with the decisions of this Court in the cases of Farmers & Mechanics National Bank vs. Dearing, 91 U. S. 29; Logan County National Bank vs. Townsend, 139 U. S. 67; Easton vs. Iowa, 188 U. S. 220, establishing that Federal statutes relative to national banks alone constitute the measure of authority of such banks, and they cannot exercise any powers except those expressly granted or incidental to carrying on the business for which they are created.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted and its judgment reversed.

SAMUEL H. WILEY,
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Attorneys for Petitioner.

United States of America,
Middle District of Georgia.

Personally appeared John C. Lewis, who, being duly sworn, deposes and says that he is Receiver of the Hancock National Bank, an insolvent national bank of Sparta, Hancock County, Georgia, duly qualified and appointed and authorized to make this affidavit; that he has read the foregoing petition for certiorari, and that the facts stated therein are true; and that said application for certiorari is not made for the purpose of delay, but that he is advised and believes that he has meritorious reasons why he should apply for a writ of certiorari to be granted in the within stated case.

JOHN C. LEWIS.

Sworn to and subscribed before me, this 12th day of February, 1934.

MARVIN G. ROUND,
Notary Public,
State of Georgia at Large,
Sparta, Ga.

(Seal)

My Commission Expires Feb. 12, 1936.

BRIEF IN SUPPORT OF PETITION.

I.

OPINIONS BELOW.

The trial court filed no opinion in this case, but its findings of fact and conclusions of law are set forth in the Record, pages 15 to 19, inclusive. The opinion of the Circuit Court of Appeals is reported in 67 Fed. (2d) 961.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Judicial Code Sect. 240 (a), as amended by the Act of February 13, 1925, Title 28 U. S. C. A., Sect. 347. The judgment of the Circuit Court of Appeals to be reviewed was entered December 7, 1933 (R. 27).

III.

STATEMENT OF THE CASE.

The nature of the case has been stated in the petition. However, it may be helpful to give the material facts out of which the case arises.

On July 6, 1928, the Governor of Georgia appointed Hancock National Bank of Sparta, Georgia, a State depository, for the term of four years, in which monies collected for State taxes should be deposited; and required the bank to give a fidelity bond in the sum of $10,000 (R. 7 & 8).

On July 12, 1928, the board of directors of Hancock National Bank, to make effective the appointment of said bank as a State depository, authorized its president to execute a bond in the sum of $10,000 (R. 10). On the same date the bank, as principal, and the Fidelity and Deposit Company of Maryland, as surety, executed a bond to the Governor of Georgia, and his successors in office, in the

sum of $10,000, (reciting the appointment as a State depository and its acceptance) conditioned for the faithful performance of all duties as should be required of the bank by the General Assembly or laws of Georgia, and to account for all public money or effects that might come into its hands during its continuance in office (R. 8 & 9).

Thereafter, on July 31, 1928, the Governor issued an order that the Tax Collector of Hancock County pay over to said bank all monies collected by him on account of State taxes, except such as might be paid directly into the State treasury (R. 10 & 11).

The Hancock National Bank became insolvent, and on May 23, 1932, the Comptroller of the Currency appointed W. K. Howard receiver of said bank. On the date of the appointment of the Receiver the deposit of State tax funds amounted to $6,157.41 (R. 3 & 4).

On July 28, 1932, the Fidelity & Deposit Company of Maryland paid to the State the amount of its deposit in the closed bank with interest, and took an assignment of the right and interest of the State, together with any preferences or liens it might have on account of the funds deposited with the Hancock National Bank (R. 4 & 11).

Upon refusal of the Receiver to recognize any lien or preference claimed by the surety on account of said deposit, the surety filed its bill in equity to establish a lien on all of the bank's assets and proceeds of assets that came into the hands of the Receiver, basing its claim to such a lien on Sects. 1252 and 218 of the Code of Georgia, as construed and applied by the Supreme Court of Georgia (See Paragraph 10 of respondent's bill, R. 4).

The Georgia Code sections cited are set forth in full in the appendix.

On written motion of the Receiver (R. 13) the trial court dismissed the surety's bill insofar as it sought to establish a lien on the assets of the bank coming into the hands of the Receiver (R. 14), and on appeal the Circuit Court of Ap-

peals reversed the judgment of the District Court (R. 27) and decided that the surety is entitled to the lien it seeks on all of the bank's assets in the hands of the Receiver (R. 34).

W. K. Howard died on January 19, 1934, and his successor, John C. Lewis, was, by order of the Circuit Court of Appeals, substituted as a party herein.

IV.

ASSIGNMENTS OF ERROR.

(1) The Circuit Court of Appeals erred in deciding in substance and effect that the statutes of Georgia declaring a lien on all the property of a State depository bank from the date of the depository bond are valid as applied to a national bank qualifying as a State depository.

(2) The Circuit Court of Appeals erred in deciding that a national bank has power to give a general lien on all of the property of the bank to secure a deposit of State funds.

(3) The Circuit Court of Appeals erred in deciding that the lien prescribed by the statutes of Georgia in the case of a depository bank is enforceable against the bank's property of all kinds in the Receiver's hands.

(4) The Circuit Court of Appeals erred in construing Sects. 1252 and 218 so as to create a valid lien on all assets of a national bank in Georgia—a lien existing from the time of the execution of the depository bond, but sleeping and innocuous until insolvency, when it becomes awakened, and attaching to all assets of every character in the hands of the receiver, destructive of the rights of common creditors.

V.

SUMMARY OF ARGUMENT.

(1) A lien in favor of the State, declared by the statutes of Georgia to arise upon the execution of the State depository bond, is invalid and void as applied to a national bank,

whether it be construed as arising on the date of the bond but ineffective until a receiver is appointed, or construed as arising on the date of the bond and binding all the property of the bank from that date.

(2) The lien as construed by the United States Circuit Court of Appeals is nothing more than a preference or priority, and violates Sects. 194 and 91 of Title 12, U. S. C. A., prohibiting preferences and providing for ratable distribution on insolvency.

(3) The lien as construed by the Supreme Court of Georgia binds and affects all the property of the bank from the date of the bond, and as so construed is invalid and void as applied to a national bank, because it impairs the functions of the bank as an agency and instrumentality of the National Government.

(4) State statutes can neither extend nor limit the powers of a national bank, and it is beyond the powers of a national bank, as measured by the Federal statutes, to give the lien as construed by the United States Circuit Court of Appeals, or the lien as construed by the Supreme Court of Georgia.

(5) When a national bank is designated a State depository and it gives a bond to secure State deposits, no lien whatever is intended or arises, as the bond required of a national bank is different from the bond required of a state bank.

VI.

ARGUMENT.

1.

Lien Invalid Under Any Construction.

The Circuit Court of Appeals takes the view that since the national bank was not required to accept the appointment as a State depository nor give a personal bond, its making bond, referring to its appointment under the statute, establishes contractually the statutory lien.

Neither the appointment nor the bond expressly provide that the State shall have a lien. Whether the lien is considered as arising contractually, on the theory the State statute is written into the bond, or as created by the State statute, the questions presented are the same, to-wit: The validity of the statute as applied to national banks and the power of national banks to give the statutory lien. Relevant provisions of the National Banking Act must be written into the bond contract as well as state statutes. (Davis vs. Elmira Savings Bank, 161 U. S. 276, 287).

It is our view that the lien declared by the State statute is equally invalid and ineffective as to the receiver of an insolvent national bank, whether it is construed as intended to be effective and operative only on the appointment of a receiver, or as intended to bind and affect the property of the bank from the date of the bond.

If the first construction be the correct one, then the so-called lien loses its character as a lien and becomes a priority, and so conflicts with the provisions of the National Banking Act prohibiting preferences and providing for ratable distribution among creditors, 12 U. S. C. A. Sects. 194 and 91 (See appendix). If the second construction be correct, as contended by the surety, then the lien binds all the property of the bank from the date of the bond to the amount of the bond, and is a lien beyond the power of a national bank to give, and beyond the power of a state legislature to authorize, as such a lien will necessarily impair the functions and efficiency of a national bank, an agency and instrumentality of the Federal Government.

2.

Lien Invalid as Construed by U. S. Circuit Court of Appeals.

It is the Circuit Court of Appeals' construction that the lien is not intended to affect the commercial assets while the bank is a going concern, but as to such assets becomes effective on the appointment of a receiver.

Assuming, without conceding, that this is a correct construction of the State statute, it means the State has no security in the case of a national bank until insolvency as far as the bank's commercial assets are concerned; that is, such assets as money, notes, accounts, securities, choses in action and the like, which constitute the bulk of the valuable assets of a national bank. In short, the effect of the statute, as so construed, is to give the State a preference or priority on insolvency.

In the case of Collins vs. New Hampshire, 171 U. S. 30, on page 34, this Court said:

> "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

The lien having the effect of giving the State a preference on insolvency and preventing ratable distribution, it necessarily conflicts with Sects. 194 and 91, U. S. C. A., Title 12.

Referring to Sect. 194 U. S. C. A., Title 12, this Court, in the case of Cook County National Bank vs. U. S., 107 U. S. 445, 450, pointed out:

> "This section provides for the distribution of the entire assets of the bank, giving no preference to any claim except for moneys to reimburse the United States for advances in redeeming notes."

If the assets to be distributed are assets belonging to the bank, under Sect. 194 they must be distributed ratably; and for any claimant to receive more than a ratable distribution, he must show a title in the property to be distributed, either legal or equitable, in which case it is not a distribution of the assets of the bank, but a return to the claimant of something that is his. Unless the Georgia statutory lien is such as gives to the State a present existing and continuing interest or title in the property of the bank from the date of the bond, it has nothing to be re-

turned to it, and the National Banking Act, the paramount law, prohibits any distribution to it or its assignee other than a ratable distribution.

The State lien on the commercial assets of a bank, as construed by the Circuit Court of Appeals, takes hold of nothing, but lies sleeping upon the threshold of insolvency, with monstrous but sensitive fingers, ready to arouse and seize all the bank owns the moment the receiver enters that threshold. But we submit that moment is too late in the case of a national bank, because the receiver enters under the protection of the National law, which stays the grasping hand of the then awakening lien (12 U. S. C. A. 192).

Pertinent here is the language of this Court in the case of Davis vs. Elmira Savings Bank, as follows:

> "Nor is the repugnancy between the state statute and the act of Congress removed by the contention that inasmuch as ratable distribution applies only to that which belongs to the bank, therefore there is no conflict between the state statute and the act of Congress. This argument can only mean that the effect of the state statute is to make the Savings Bank, in the event of insolvency of the National Bank, the owner of a sum equivalent in amount to the sum of money which was by it deposited. But to say this aggravates the conflict between the state law and the act of Congress. If the state statute is to be read as saying that whenever the persons named therein deposit money with a national bank they shall be treated as the owner of an equal sum of the assets of the bank when it becomes insolvent, then the state statute precludes, in a most flagrant way, the possibility of the ratable distribution ordered by the act of Congress."
>
> Davis vs. Elmira Savings Bank, 161 U. S. 275, 288.

The construction placed by the Circuit Court of Appeals on Sects. 1252 and 218 of the Code of Georgia, creating a lien on the property of a depository bank, is in conflict with the construction given those sections by the Supreme Court of Georgia. While it is true that the State courts were

called upon to construe the sections in cases arising after the insolvency of *state* banks, there is nothing in the decisions of the State courts to indicate that a distinction is made between real estate and other assets, nor is there anything to indicate that the lien is not effective as to commercial assets while the bank is a going concern.

We point out with particularity the following language in the State court decisions:

> "Plaintiffs in error contend that the state has no lien on the notes, accounts and choses in action of said bank, because under our law a judgment fixes no lien on such property, and no levy and sale thereof can be had at law. The reply is, that upon the execution of the bond, the law gave the state a lien upon all the property of the bank; not upon such property only as a judgment would fix a lien upon; not upon such property only as is subject to levy and sale; but upon all the property of the bank. Are not notes and accounts property? Can any reason be given why it is not competent for the legislature to give a lien upon notes and accounts, as well as upon any other property?"

Seay et al. vs. Bank of Rome et al., 66 Ga. 609, 614.

> "We think they were bound to know of the existence of this lien: the law created the lien and expressly provided that it should exist, from the time of the execution of the bond, upon all the property of the principal and sureties; and everybody must take notice of this; the law gives them this notice."

Simpson & Ledbetter vs. Mathis, Sheriff, 79 Ga. 159, 161.

> "To the granting of this order the State excepted. Were the notes in question assets of the bank upon which the State's lien takes effect, without reference to the liability of the bank to the makers of these notes for amounts justly due them, respectively, on their deposits? We think not. On the contrary, in our opinion, these notes were assets only in so far as there might be due to the bank balances upon them after de-

ducting the amounts of the respective deposits, if those deposits were made bona fide while the bank was engaged in the transaction of its regular business and had control of its books."

State vs. Brobston, Receiver, 94 Ga. 95, 97.

The Circuit Court analogizes the depository lien to a Georgia chattel mortgage on a stock of merchandise; but it will be noted that the law of this State in regard to such chattel mortgage expressly provides:

"in which case the lien is lost on all articles disposed of by the mortgagor up to the time of foreclosure, and attaches to the purchases made to supply their place." (Georgia Code of 1910, Sect. 3256. See appendix.)

As to a chattel mortgage on a stock of goods, when the Legislature intended that the lien should be lost on the goods disposed of and should attach to those acquired, it expressly said so. We see nothing in the State depository law which authorizes the court to write into it a provision which the Legislature has seen fit to leave out.

The same criticism may be made of the lower court's analogy to a judgment lien, the Code of Georgia expressly relieving choses in action from the lien of and seizure under a judgment (Code of Georgia, Sect. 5948. See appendix).

Furthermore, the lower court's construction that the lien does not apply to commercial assets while the bank is a going concern, means the State has no lien as to such assets while it is solvent and doing business. The following language of this Court is apposite here:

"We have already said that the judgment created a lien, now it is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes cum onere; if this were not the case, it would cease to be a lien."

Burton vs. Smith, 13 Peters 464, 483.

Certainly the State can acquire no lien after insolvency.

3.

Lien Invalid as Construed by Georgia Supreme Court.

The statutes here under consideration, as construed by the State courts, create a lien on every conceivable asset of the bank from the date of the bond. There is no separation, no half-way ground, no specific property can be said to be affected while other assets escape. What then is the necessary effect of such statutes on the function of a national bank? The bank cannot sell the property it is authorized to acquire and required to dispose of under Title 12 U. S. C. A. Section 29, for no one would take it subject to a lien to the amount of the bond. Even the dividends the bank may declare under 12 U. S. C. A. Sect. 60, will be subject to the lien. How shall a national bank dispose of stock it acquires under 12 U. S. C. A. Sect. 83, which it is required to sell within six months from the date of purchase, if there is a lien attached to it? The very bonds a national bank is required to deposit with the Treasurer of the United States, under 12 U. S. C. A. Sect. 90, would be subject to the lien of the State if the lien declared by state law is effective, thereby destroying the function of the national bank as a depository of public money of the United States and a financial agent of the Government. Is it possible to conceive a lien being required on every asset of a bank except in contemplation of insolvency and to prevent the application of the bank's assets pro rata to its creditors? In fact the Supreme Court of Georgia, in the case of Mathis vs. Morgan, 72 Ga. 517, on page 522, said in effect that the bond was required "in apprehension that the Governor might make a mistake in its (the bank's) solvency."

Does not such a lien clearly offend against 12 U. S. C. A. Sect. 91? How can a national bank procure an issue of circulating notes after the lien of the State attaches to the bonds it must deposit with the Treasurer of the United States as provided in 12 U. S. C. A. Sect. 101? Is it think-

able that the Treasurer of the United States must accept bonds subject to a lien to secure deposits of the United States? How can the bank maintain a reserve or collateral with the Federal Reserve or other banks to procure necessary money from time to time to carry on its banking business, if its money and collateral are subject to a lien of the State? Is it conceivable that the money deposited by a national bank under Sect. 121 of Title 12 U. S. C. A., to be used for the redemption of its circulating notes, shall be subject to a lien of the State? (The relevant part of sections of the National Banking Act cited above are quoted in the appendix.)

A consideration of the foregoing questions makes it clear that a state statute creating a lien from the date of the bond is in conflict with many provisions of the National Banking Act and violative of its spirit and purpose, and, as applied to a national bank, is void.

> "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they are created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court."
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> Davis vs. Elmira Savings Bank, 161 U. S. 275, 283.
>
> See also:
>
> First Nat. Bank of San Jose vs. California, 262 U. S. 366.

4.

Lien is Ultra Vires.

It is established by the repeated decisions of this Court that the National Banking Act constitutes a complete system for the establishment and government of national banks, and provides everything essential to the winding up and distribution of their effects, neither limited nor enlarged by other statutory provisions, state or Federal, with respect to the settlement of demands against insolvent banks; and that Federal statutes alone constitute the measure of authority of such banks; and they cannot exercise any powers except those expressly granted and such as are necessary for the purpose of carrying into effect the powers expressly granted.

See:

Cook County Natl. Bank vs. U. S., 107 U. S. 445.
Farmers & Mechanics Natl. Bank vs. Dearing, 91 U. S. 29.
Logan Natl. Bank vs. Townsend, 139 U. S. 67.
Easton vs. Iowa, 188 U. S. 220.

There is no provision in the National Banking Act giving a national bank the express power to give a lien on all of its assets of every kind and character to secure a deposit of state funds, whether such a lien be construed as effective from the date of the bond or as effective only upon the appointment of a receiver for the bank. We do not see how it is possible to determine that the power to give such a lien is necessary to the business of banking. To the contrary, as we have heretofore pointed out, such a lien would conflict with and offend against many provisions of the National Banking Act.

Looking to the entire National Banking Act, we assert with confidence that the lien contended for, whether it be the lien as construed by the United States Circuit Court of Appeals, or the lien as construed by the Georgia Su-

preme Court, is beyond the power of a national bank to give. If the bond given by the Hancock National Bank carried with it such a lien, then the bond to that extent was ultra vires and void. If the lien be considered as binding on all the assets of the bank from the date of the bond, it must necessarily have the effect of hampering the business of the bank and impairing its functions and efficiency as an agency of the Government. On the other hand, if the lien only becomes effective on insolvency, it is nothing more than a priority or preference, and equally beyond the power of a national bank.

The Circuit Court of Appeals cites the cases of United States vs. Robertson, 5 Peters, 641, and Planters Bank vs. Sharp, 6 Howard, 323, in support of its position that a state may have a lien on the entire assets of a national bank. These cases were decided long before the National Banking Act was passed and they deal exclusively with state banks. We do not understand that state banks are agents or instrumentalities of the state government; but to the contrary, the primary purpose of banks created under charters granted by the states is private gain to the incorporators. We do not know what were the express powers given the Bank of Sommerset, involved in the case of United States vs. Robertson, but it may be safely assumed they were not identical with the powers of a national bank. It is probable that the United States was a preferred creditor of the Bank of Sommerset as it would be today under the Federal statute (31 U. S. C. A. 191), but this is not true as to a national bank. (Cook County National Bank vs. U. S., 107 U. S. 445.)

Furthermore, it has been pointed out by this Court that the primary purpose of creating a national bank is not private gain to its incorporators, but the creation of an agency or instrumentality of the National Government, designed to aid in the administration of an important branch of the public service. Certainly such a bank is not on a parity with state banks; and we do not see how decisions relative

to state banks, created solely under state law, are helpful to determine the powers of a national bank.

We respectfully submit that the decisions cited do not sustain the position of the Circuit Court of Appeals.

The Circuit Court of Appeals seems to consider a *sufficient pledge* of specific collateral as harmful to general depositors as a general lien on the bank's entire assets. We think there is a vast difference in the effect of the two types of security. Of course, if the bank pledged its entire assets, including its money, it would go out of business. If it gives a general lien, depositors and others deal with the bank at their peril; whatever they acquire from the bank may be claimed under the general lien. On insolvency a creditor with specific collateral is limited in his advantage to the collateral he holds. If it shrinks and becomes less than the debt, as to the difference he must share pro rata with unsecured creditors, while a creditor holding a general lien takes all the assets in the receiver's hands, if necessary, to pay his debt. If the lien does not consume all assets held by the receiver when they shrink in value, the reduction in the pro rata to unsecured creditors is multiplied by the relatively greater portion going to the lien creditor. A general lien defeats completely the equal distribution provision of the National Banking Act and runs counter to the whole spirit and purpose of the Act. This alone, we think, is sufficient to render it invalid, regardless of when or how it arises. Such liens were not contemplated or intended to be within the power of a national bank.

5.

No Lien Attaches to the Bond Required of a National Bank.

Laws creating liens as contended for in this case should be strictly construed, particularly when the rights of third persons (here, common depositors) are involved. Certainly the only bond that can have the effect of creating this all-absorbing lien in any case is the statutory bond prescribed

by Sect. 1252. This statutory bond is conditioned "for the faithful performance of all such duties as shall be required of them by the General Assembly or the laws of this State," and to faithfully account, etc., and is to be not less than the amount of the deposit, and under such a bond the State may deposit an amount equal to the bond.

The bond required of a national bank is not such a statutory bond for two reasons:

(1) The first condition of the bond is one the bank cannot make, for it cannot unqualifiedly agree for the State to prescribe its duties or regulate its affairs. (See cases cited above.)

(2) The amount of the bond is double that required by the statute of a state bank. Section 1256 of the Code of Georgia, 1910 (see appendix), provides:

> "* * * and whenever a national bank is selected as a State depository the amount of the bond shall be double the amount of the money to be deposited with it."

The change in the amount of the bond is a very material change, because the statutes prescribe that the lien shall be for the amount of the bond, not the amount of the deposit. Under the statutory bond the depository may receive deposits equal to the amount of the bond, but under the bond required in 1928 of a national bank, it could receive State deposits of only half the amount of the bond. So we say that under a proper construction of the State laws no lien arose upon the execution of the bond by a national bank.

If it is considered that the lien arises by contract, then it is only a valid contract within the purview of the State statutes that could create a valid lien. A national bank certainly cannot make a contract agreeing to perform all such duties as shall be required of it by the General Assembly or the laws of the State. The lower court answers

this contention by saying that no duties except to receive and account for public monies had been required of the bank. It is a novel rule to us that an agreement, invalid in its inception, is rendered valid because nothing has been demanded under it. However, the statute contemplates at least one other duty to the State, and that is to keep the Treasurer informed at all times of its financial condition. (Sect. 1254, Code of Georgia, 1910. See appendix.)

The only bond the Governor was authorized to take by the law of Georgia was a bond for double the amount of the deposit. The Circuit Court of Appeals says that the amount of the bond was not double the deposit. Then the Governor violated his authority and the bond contract was not in compliance with the statute, because the statute demands a bond double the amount of the deposit.

Why Writ Should Issue.

A determination of the effect of the state statutory lien, the property to which it attaches, and the time when it attaches, are questions of vital concern to the thousands of depositors who deal with banks appointed state depositories, and likewise of great concern to the large central banks and the Federal Reserve Banks who lend vast sums of money to both state and national banks that may be state depositories.

The Comptroller is vitally concerned as to the effect of such statutes, that he may perform his duties in the proper distribution of an insolvent bank's assets; and if he is to be charged with having tacitly approved depository contracts, as the Circuit Court of Appeals indicates he is, then he is certainly entitled to have this Court determine the scope of the contract for which he is so chargeable.

We respectfully submit that this case presents Federal questions of importance, involving a great instrumentality

of the Government, and that they should be settled by this Court.

Respectfully submitted,

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APPENDIX.

Sections of the Code of Georgia Cited.

(Park's Annotated Code or Code of 1910)

Sect. 218, Code of Ga. Each security on the bond of the treasurer shall make oath that he is bona fide worth, over and above his debts, exemptions and liabilities of all kind, property in realty and personalty not less than some specified sum to be stated in said oath, which oath shall be attached to said bond, and recorded therewith. He may, by express stipulation in writing, limit his liability to a specific sum to be stated in said bond; and all the property of the treasurer to the full amount of said bond, and the property of the securities to the amount for which they may be severally bound, shall be liable for the faithful performance by the treasurer of the duties of his office, from the date of the execution of said bond; and a lien is hereby created in favor of the State upon the property of the treasurer to the amount of said bond, and upon the property of the securities upon his said bond to the amount for which they may be severally liable, from the date of the execution thereof.

Sect. 1252, Code of Ga. Each of said depositories shall, before entering upon the discharge of their duties, by their proper officers, execute a bond, with good and sufficient securities, to be fixed and approved by the Governor. Said bond shall be conditioned for the faithful performance of all such duties as shall be required of them by the General Assembly or the laws of this State, and for a faithful account of the money or effects that may come into their hands during their continuance in office. Said bond shall be filed and recorded in the executive office, and a copy thereof, certified by one of the Governor's secrefaries under the seal of the Executive Department, shall be received in evidence in lieu of the original in any of the courts of this State; and said bonds, shall have the same binding force and effect as the bond required by law to be given by State treasurers, and, in case of default, shall be enforced in like manner. In fixing the bond to be given by a depository under this section, the Governor shall so fix the same as to make it not less than the amount of money entrusted to said depository, and in no case shall a larger amount of money be deposited in any bank than the amount of the bond, and

the Governor may at any time require additional bond, if necessary, to cover fully the amount deposited or intended to be deposited in such bank.

Sect. 1254, Code of Ga. It shall be the duty of the treasurer to keep advised, and to keep the Governor advised from time to time, of the financial condition of the various State depositories, as well as of the financial condition and standing of the securities on the bonds of such depositories, and if at any time they should become satisfied of the insolvency of any of the depositories, or that the affairs of any of said depositories are in an embarrassed condition, it shall be the duty of the Governor to direct the treasurer to withdraw the money of the State from such depository, and the Governor may declare the position vacant and may proceed to appoint another bank in the same locality to act as such depository for the unexpired term under the rules and regulations prescribed by law. In case the Governor should be advised of the insolvency of the securities on the bond of any of said depositories, it shall be his duty to notify such depository to strengthen said bond, and if at the end of ten days said bond is not strengthened, the Governor shall declare said office vacant, and proceed to fill the same by new appointment.

Sect. 1256, Code of Ga. The treasurer of this State shall not deposit at any one time, or have on deposit at any one time in any one of the depositories of this State for a longer time than ten days, a sum of money belonging to this State that exceeds the bond given by said depository to the State. The treasurer shall check from any depository the amount of the State's money that said depository holds in excess of its bond, and pay the sum into the treasury: Provided, that a State depository may be allowed to hold a sum greater than fifty thousand dollars, but not in excess of one hundred thousand dollars, upon such depository giving a new bond to cover the maximum amount to be deposited with it, and when such new bond has been executed and delivered to the Governor, the old bond shall be discharged and surrendered, and whenever a national bank is selected as a State depository the amount of the bond shall be double the amount of money to be deposited with it. The bond to be made by the State depositories may be a personal bond or may be made by a deposit with the State

treasurer of United States bonds or Georgia State bonds, or either one or both of said methods.

Sect. 3256, Code of Ga. A mortgage in this State is only security for a debt, and passes no title. It may embrace all property in possession, or to which the mortgagor has the right of possession at the time, or may cover a stock of goods, or other things in bulk, but changing in specifics, in which case the lien is lost on all articles disposed of by the mortgagor up to the time of foreclosure, and attaches to the purchases made to supply their place. A mortgage given by a person or a corporation to a trustee or trustees, to secure an issue of bonds, shall, when it is expressly so stipulated therein, embrace and cover after-acquired property of such person or corporation.

Sect. 5948, Code of Ga. A judgment has no lien upon promissory notes in the hands of the defendant; nor are choses in action liable to be seized and sold under execution, unless made so specially by statute.

Sections of the National Banking Act Cited.

Sect. 29, Title 12, U. S. C. A. A national banking association may purchase, hold, and convey real estate for the following purposes, and, excepting as provided otherwise in section 371 of this title, for no others:

First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years.

Sect. 60, Title 12, U. S. C. A. The directors of any association may, semiannually, declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one-tenth part of its net profits of the

preceding half year to its surplus fund until the same shall amount to 20 per centum of its capital stock.

Sect. 83, Title 12, U. S. C. A. No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section 192 of this title.

Sect. 90, Title 12, U. S. C. A., as far as pertinent. All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: * * * Provided that the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

Sect. 91, Title 12, U. S. C. A. All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed in this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued

against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

Sect. 101, Title 12, U. S. C. A., as far as pertinent. Upon the deposit with the Treasurer of the United States, by any national banking association, of any bonds of the United States in the manner provided by existing law, such association shall be entitled to receive from the Comptroller of the Currency circulating notes in blank, registered and countersigned as provided by law, equal in amount to the par value of the bonds so deposited; * * *. Provided, that nothing herein contained shall be construed to modify or repeal the provisions of section 175 of this title, authorizing the Comptroller of the Currency to require additional deposits of bonds or of lawful money in case the market value of the bonds held to secure the circulating notes shall fall below the par value of the circulating notes outstanding for which such bonds may be deposited as security * * *.

Sect. 121, Title 12, U. S. C. A., as far as pertinent. Every national banking association organized under the provisions of this chapter, shall at all times keep and have on deposit in the Treasury of the United States, in lawful money of the United States, a sum equal to 5 per centum of its circulation, to be held and used for the redemption of such circulation, which sum shall in no case be counted as a part of its legal reserve; * * *

Sect. 194, Title 12, U. S. C. A. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.